Crl.A. 372/2001
BEFORE
THE HON'BLE MR JUSTICE P.G.AGARWAL

Heard Mr. Z. Kamar, learned counsel for the petitioner and Mr.K.Munir, learned P ublic Prosecutor, Assam.

2. In Sessions Case No.10/96 two accused appellants Hasi Mohan Barm an and Abinash Biswas were tried by the learned Additional Sessions Judge, Kokra jhar (FTC) and on conclusion of trial both the accused were convicted under Sect ion 313 IPC read with Section 34 IPC and sentenced to undergo imprisonment for 5 years and to pay fine of Rs.7000/- each, in default, to undergo further impriso nment for one year and hence the present appeal.

3. Prosecution case, in brief, is that accused Hasi Mohan had love affair with the informant Haleswari Barman (PW1) which extended to physical relationshi p and as a result of which, the PW-1 became pregnant. Thereafter, the villagers forced Hasi Mohan to marry PW-1. But, after some time, the husband Hasi Mohan as ked the PW-1 to abort the child, which PW-1 refused to do. Thereafter, on the ni ght of occurrence, the accused Hashi Mohan forcibly took her to the pharmacy of the co-accused Abinash Biswas, who administered certain injection and whereupon the PW-1 became unconscious and the child was aborted. She was administered sali ne etc. and the accused Hasi Mohan kept her at 'Pampghar' for about 9 days where from she was taken to her parents house. Subsequently, she filed complaint that her abortion has been caused without her consent. The Doctor examined the victim and the police submitted charge sheet. Initially, the case was charge sheeted a gainst the accused Hasi Mohan Roy @ Barman only and the case was committed to th e Court of Sessions. Thereafter, on the prayer of the Public Prosecutor, the lea rned trial Court summoned accused appellant Abinash Biswas under Section 319 Cr. P.C. vide order dated 07.04.1997 and thereafter the trial Court proceeded agains t both the accused persons.

4. Learned counsel for the appellant has challenged the order of conviction of Abinash Biswas on the ground that Abinash has been arrayed as accused in vio lation of the provisions of Section 319 Cr.P.C. as he was summoned as accused un der Section 319 Cr.P.C. solely on the basis of the police investigation itself a nd without recording the evidence of the witnesses.

5. It may be mentioned here that the present case arose out of a complaint filed by the informant PW-1, wherein the name of the accused Abinash Biswas was mentioned as accused. The said complaint was sent to police, who after investiga tion submitted charge sheet against accused Hasimohan only. The learned Public P rosecutor therefore submitted that there is material against the accused Abinash Biswas and accordingly Abinash Biswas was summoned under Section 319 Cr.P.C.

6. During the trial, after certain witnesses were examined, accused Abinash Biswas raised an objection regarding arraying him as an accused. The learned tr ial Court vide order dated 07.09.98 held that the mistake, if any, in compliance with the provisions of Section 319 Cr.P.C. cannot be corrected by the Court its elf as it has no power to review. Further, the accused did not file any revision against the said order whereby the accused Abinash Biswas was summoned. In the order dated 07.09.1998, the Court also held that from the evidence of PW-1 it ap pears that there are materials to suggest involvement of Abinash Biswas in the a bove crime. We thus find that neither the order dated 07.04.97 nor the order dat ed 07.09.98 was challenged by the appellant Abinash Biswas. On perusal of the ab ove two orders, we find that although the order dated 07.04.97 was passed prior to the recording of evidence, as is required under Section 319 Cr.P.C, the subse quent order dated 07.09.1998 was passed after the statements of witnesses were r ecorded and there is specific mention in the order that from the evidence of PW-1 also involvement of accused Abinash Biswas is disclosed.

7. In the case of State of Karnataka v. Kuppuswami Gownder , AIR 1987 SC 1354, the Apex Court held :-

In this view of the matter therefore reading S.462 along with S.465 clearly goes to show that the scheme of the Criminal P.C. is that where there is no inherent lack of jurisdiction merely either on the ground of lack of territorial jurisdiction or on the ground of any irregularity of procedure an order or sentence awarded by a competent Court could not be set aside unless a prejudice is pleaded and proved which will mean failure of justice. But in absence of such plea merely on such technical ground the order or sentence passed by a competent Court could not be quashed.

8. The defence has not submitted anything to show that he has been prejudiced in any manner and admittedly the order whereby he was summoned as accused was never challenged although the accused had approached this Court earlier for bail etc.

9. There is another aspect of the matter also. The name of the accused appears in the complaint petition, which has been treated as FIR in the present case and thus there was an investigation involving the accused Abinash Biswas. However, the police did not submit charge sheet against the accused Abinash Biswas. Law is well settled that even if police report states no case is made out after investigation, the Court can take cognizance on the basis of the police report itself and issue process. If any reference is needed, one can have a look at the decision of the Apex Court in H.S.Bains vs. U.T. of Chandigarh, AIR 1980 SC 1883.

10. Considering the facts and circumstances of the case, we hold that irregularity, if any, has not occasioned any failure of justice and in our opinion, this is a curable irregularity under Section 465 Cr.P.C.

11. Now coming to the merit of the appeal, the victim Haleswari (PW-1) has deposed that the accused on promise to marry her made sexual relationship with her and as a result of which she became pregnant. Thereafter, the villagers gave her in marriage and she stayed with the accused as his wife for about three months. During this period the accused put pressure on her to abort the child, but she did not agree. Thereafter, on the night of occurrence, the accused person along with his brothers forcibly took her to the Pharmacy of the co-accused Abinash Biswas where she requested accused Abinash not to administer any injection or medicine to her. However, the accused Abinash asked her husband and other persons to caught hold of her and he himself slapped her and thereafter the accused administered one injection as a result of which she became unconscious. It was around 10/10.30 P.M.. Afterwards, when she regained sense, she saw saline being administered to her. At that time the husband Hashi Mohan asked Abinash to administer another injection whereupon the accused Abinash gave another injection and she again became unconscious. Later on, when she became conscious, she found herself in the Pamghar of Hashi Mohan and found that she has lost her pregnancy. Later on, when she returned back to her husband’s house, but she was thrown out by the accused and other relations and she was forced to take shelter at her parent’s village.

12. P-3 Dr. Rezaul Karim, who had examined PW-1 on 22.03.95 i.e. after more than a month of the abortion, found as follows:-

There was active slight bleeding as per vagina. For confirmation D &E (Dilatation and Evacuation) done and found placental parts inside the uterine cavity which is a sign of incomplete abortion i.e. she was pregnant.

13. PW-4 Dr.Dilip Bhowmik, is an Ayurvedic Physician. He used to practice medicine from the pharmacy, where Abinash Biswas was a Pharmacist. He has deposed that one day PW-1 was brought to him by her husband and other relation and on examination he found that the woman is running pregnancy of 4/5 months. As she had some problems, he gave some medicine. This was on 20.02.95 and Ext.A is

the prescription given by the PW-4 wherein it has been mentioned that the PW-1 was having pregnancy of 22 weeks.

14. Learned counsel for the appellant has submitted that the evidence regarding pregnancy is missing. We find there is oral evidence of PW-1 supported by medical evidence of PW-3 and PW-4. PW-4 had examined PW-1 while she was carrying pregnancy and PW-3 examined the PW-1 after the abortion and he found that the abortion is incomplete and he did dilation. It is also submitted that merely administering injection may not have the effect of causing abortion. But, we find from the evidence of PW-1 that she has categorically stated that after injection was pushed she became unconscious and later she found that she has lost the child. She has also stated that she was feeling the child when she was pregnant. On consideration of the evidence on record, we have no hesitation to hold that PW-1 was pregnant through accused Hashi Mohan and later wanted to abort the child. As the mother refused, accused Hashi Mohan with the help of Abinash Biswas, caused miscarriage. As such, the offence under Section 313 IPC against both the accused persons have been made out beyond all reasonable doubt.

15. Learned counsel for the appellant also submitted that the recording of statement under Section 313 Cr.P.C. is not proper. The evidence and circumstances appearing against the accused persons are very specific. We have asked the learned counsel that in case he wants to explain any other circumstance, he can do so but no explanation was given. In this case, both the accused persons took the plea of denial.

16. In view of the above, we affirm the order of conviction of both the accused appellants Hasi Mohan and Abinash Biswas under Section 313 read with Section 34 IPC.

17. On consideration of the submission as regards sentence, the sentence of both the accused persons is reduced to imprisonment for three years and to pay fine of Rs.5000/- each, in default, to undergo further imprisonment for three months. With the above modifications, the appeal stands disposed of.

Send down the records to the learned Sessions Judge, Kokrajhar, who shall take the accused persons into custody forthwith to serve out the sentence and to pay fine.